NO. 2824.

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In the
United States Circuit Court of Appeals
for the Ninth Circuit

IN THE MATTER OF SOUTHERN ARIZONA SMELTING COMPANY, a corporation, Bankrupt,

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

—vs—

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a corporation, Bankrupt,

Appellee.

REPLY BRIEF OF APPELLANT TO BRIEF OF APPELLEE.

SELIM M. FRANKLIN,
Solicitor for Appellant.

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REPLY BRIEF OF APPELLANT TO BRIEF OF APPELLEE.

The Copper Company did not own the shares of stock of the Smelting Company.

Counsel for appellee, in their main brief, seem to appreciate the fact that if the Copper Company did **not**

own the shares of stock of the Smelting Company, then the Copper Company could not own the assets or property of the Smelting Company.

They assert and argue, however, that the Smelting Company was a subsidiary, instrumentality, agent, and **alter ego** of the Copper Company, **because** it owned all the shares of stock of the Smelting Company; and being such owner, it was the owner of all the property represented by those shares, to-wit, the assets and property of the Smelting Company.

And they further assert that the Copper Company, for said reason, not only was the owner of the flue dust and slag, which are a part of the assets or property of the Smelting Company; but was the owner of all the assets and property of the Smelting Company. And they further assert that as the Copper Company was the owner of all the property of the Smelting Company, Martin, its trustee in bankruptcy, is entitled to recover from Freeman, the trustee in bankruptcy of the Smelting Company, not only the flue dust and slag dump, but all the other property of the Smelting Company, bankrupt, so that the same can be applied to the payment of the general creditors of the Copper Company.

The whole argument is based upon the assumption that the Copper Company was the owner of all the shares of stock of the Smelting Company. And in summarizing the facts as found by the court, they say (page 19 of their brief) that the corut found the following to be a fact, to-wit, we quote the language of their brief:

"That the Copper Company received all the profits of the Smelting Company **and was the owner of all the shares of stock of said company.** (Trancript p. 79)."

Now, we say, the court did **not** find that all the profits of the Smelting Company were recived by the Copper Company; nor did the court find that the Copper Company was the owner of the shares of stock of the Smelting Company, **after** the Copper had transferred the same to the Bankers Trust Company as security for the $2,000,000 issue of bonds.

The finding in the Transcript, referred to by counsel in their brief, does not support their statement.

The finding so referred to, is as follows, we quote for the convenience of the court:

"Between the time that the Smelting Company was organized and down to the time it was adjudicated a bankrupt, on September 29, 1914, it declared only one dividend to its stockholders, to-wit, on the 31st day of October, 1909, the amount of said dividend being the sum of $49,853.62. This dividend was paid to the Imperial Copper Company, **as it appeared at that time as the registered owner on the books of said Smelting Company, as the owner of all the stock of said Smelting Company."**

Finding 24, Transcript of Rec. p. 79

We will briefly review the findings of fact on the question of ownersihp of stock

The Smelting Company did issue all of its issued stock to the Copper Company on or before the 21st

day of December, 1908, and on December 21, 1908, the Copper Company did own all that stock. The court so finds, and there is no question on that point.

But on December 21, 1908, the Copper Company sold, assigned and transferred all those shares of stock to the Bankers Trust Company, and deposited the certificates therefor with the Bankers Trust Company, as a pledge and collateral security, to secure the principal and interest of its bond issue of $2,000,000. This fact, and a copy of the written assignment itself, are set forth in findings 29 and 30, Transcript of Record, pages 82, 83, and 84.

It is a fact, and the court so finds, that the Bankers Trust Company did not cause the certificates for stock so assigned and delivered to it to be transferred upon the books of the Company until the 20th day of June, 1911; but on June 20, 1911, it did cause said shares to be transferred to it on the books of the Company. The finding of fact on this specific point is as follows:

> "Said certificates, so assigned, remained in the exclusive possession of the Bankers Trust Company until on or about June 20, 1911, when the same were by the Bankers Trust Company surrendered for cancellation and reissue, whereupon the same were cancelled and reissued in the name of Bankers Trust Company, as Trustee. And said stock was thereupon transferred and reissued on the books of the said Smelting Company, in name of Bankers Trust Company, as such Trustee, and proper certificates for said stock were issued and delivered to said Bankers Trust Company, as Trustee under said mortagage, and remained in the ex-

clusive possession of the Bankers Trust Company until the same were delivered by it to the Receiver of the Imperial Copper Company, appointed by the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in a certain foreclosure suit brought by said Bankers Trust Company against the Imperial Copper Company to foreclose the said mortgage and the lien of the collateral security aforesaid, as hereinafter set forth."

Finding 30, Transcript of Rec. pp. 84-85.

Because these certificates were not transferred on the books of the Smelting Company on October 31, 1909, when the Smelting Company declared the one and only dividend that it ever did declare, is the reason why that dividend was paid to the Copper Company. The Copper Company stood on the Smelting Company's books as the registered owner of the shares. And the court so finds in finding 24, Transcript page 79, heretofore quoted.

There is no finding as to what the Copper Company did with the money so received. It may have paid it to the Bankers Trust Company on account of interest on the bonds, or it may have paid other money account of interest. There is no finding whatsoever on this point; and it was immaterial in the case.

In 1911 the Copper Company made default in the payment of interest on the $2,000,000 of bonds issued by it, and on July 3, 1911, the Bankers Trust Company filed its suit before the District Court of the Territory of Arizona against the Copper Company, to foreclose

its lien upon and shares of stock. Finding 31, Transcript p. 84.

In that suit Martin, as Trustee of the Copper Company, Bankrupt, did intervene and did file his answer, wherein he claimed that he, as such trustee, was entitled to said stock of the Southern Arizona Smelting Company, and denied the validity of the lien thereon, asserted by the Bankers Trust Company. Finding 32, Transcript p. 84.

Thereafter, and on December 28, 1914, judgment was rendered in that case, and findings of fact and conclusions of law were made. Finding 33, Transcript p. 86.

And in regard to this judgment and the findings of fact, the lower court in the present case did find as follows:

> "That in the said suit of Bankers Trust Company for the forecloseure of said trust deed and said pledge of stock, aforesaid, said Superior Court did make and file findings of fact **which are binding and conclusive upon John H. Martin, Trustee of Imperial Copper Company,** in the present case, he having been a party to the suit aforesaid."
>
> Finding 35, Transcript, p. 87.

In the findings of fact and decree rendered in the foreclosure suit, so held to be binding and conclusive upon Martin, as trustee of Imperial Copper Company, the said court did find and decree, we will quote from the record in the present case:

"That on or about December 21, 1908, said Imperial Copper Company duly assigned to the Bankers Trust Company all of the capital stock, consisting of 9,000 sahres, of the Southern Arizona Smelting Company, as additional collateral to secure the payment of the principal and interest of the said bonds, aforesaid, and that contemporaneously therewith said Imperial Copper Company did deliver to the Bankers Trust Company proper certificates for all of said shares of stock, duly assigned in blank by the registered holder thereof, in the usual form for stock exchange delivery; that said certificates so assigned, remained in the possession of the Bankers Trust Company until on or about June 20, 1911, when the same were surrendered by it for cancellation and reissue, whereupon the same were cancelled and were reissued to said Bankers Trust Company as Trustee, and said stock was thereupon transferred and reissued on the books of said Southern Arizona Smelting Company to said Bankers Trust Company as Trustee, and proper certificates of stock were issued and delivered to it, as Trustee under the said mortgage, and that at the time of the commencement of the said action to foreclose said mortgage and deed of trust and lien ofaresaid, the said Bankers Trust Company was the duly registered holder of all the stock of said Southern Arizona Smelting Company, except as to qualifying shares for directors, certificates for which the said Bankers Trust Company holds in its custody, duly assigned."

Finding 35, Transcript of Rec. pp. 87-88.

The lower court in the present case then, not only found as a fact that all of the capital stock of the Smelting Company was by the Copper Company assigned as collateral security to the Bankers Trust Company, but further found that this fact, having been adjudicated

by the State Court, was forever conclusive upon Martin.

The lower court, in the present case, does further find as a fact, that on the 28th day of December, in the foreclosure suit aforesaid, the State Court did foreclose the lien and pledge upon said shares of stock, and did direct the same to be sold by its Receiver and Special Master; and that thereafter the same were, by the Receiver and Special Master, duly sold on April 19, 1915, to Leo Goldschmidt; that the sale was confiremd by said State Court, and the certificates were duly assigned on that day to said purchaser. Finding 36, Transcript of Rec. p. 90.

And the lower court in this case did further find, we will quote the exact language of the finding in the record:

> " * * * and neither the Imperial Copper Company, nor the said Bankers Trust Company, nor John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, have any right, title or interest in or to the said shares of capital stock of said Southern Arizona Smelting, or any thereof."
>
> Finding 36, Transcript of Rec. p. 90.

In the very face of this finding of fact of the lower court in the present case; in the face of this very decree of foreclosure which the lower court said is conclusive and binding on Martin, as trustee, counsel for appellee in their brief herein say, that the lower court found as a fact that the Copper Company **was** the owner of these shares of stock.

And counsel for appellee base the right of Martin, Trustee, to the assets of the Smelting Company, upon their assertion that the Copper Company was the owner of all the stock of the Smelting Company, when the lower court itself specifically found that it was not such owner.

It is elementary that the foreclosure of a lien or mortgage, forecloses the right and title of the mortgagor or pledgor as the same stood on the day when the mortgage or pledge was given. The foreclosure of the lien or pledge in the suit just mentioned, foreclosed and determined the right and title which the Copper Company had to the stock of the Smelting Company on December 21, 1908, the day that the pledge or lien upon that stock was created. Goldschmidt acquired at the foreclosure sale all the title which the Copper Company had in and to the shares of the Smelting Company, so pledged, as aforesaid, on the 21st day of December, 1908. His ownership of the stock is of all the rights that the Copper Company had on that day.

As the Copper Company had pledged the stock on December 21, 1908, as security for bonds and interest thereon, the only right and title it had thereafter in and to said stock, was the right to redeem; the right to pay the debt and get its stock back. This right of redemption was an asset of the Copper Company. This asset did pass to Martin as its trustee. As its trustee in bankruptcy, he had the right to redeem. But when the decree foreclosing this right was rendered by the State

Court, then all the rights of the Copper Company, or of Martin, as its Trustee, even to redeem, were forever foreclosed.

Counsel for appellee do not assert in their brief that Martin, Trustee, has any right or title of any kind in and to the shares of stock of the Smelting Company. But they do assert that Martin, as Trustee, is entitled to all of the assets and property of the Smelting Company, by virtue of the fact that the Copper Company some eight years ago was the owner of said shares of stock. And they asked the lower court, and this court, to adjudge that they are entitled to all of those assets, of which the flue dust and slag dump are only a part, on the theory that these assets belong to the Copper Company, notwithstanding that the Copper Company did not own the shares of stock of the Smelting Company any time after the same were pledged, but only owned the right to redeem the same from the pledge.

Goldschmidt, the owner and holder of the stock, is not a party to this action. He has had no opportunity to be heard. The creditors of the Smelting Company whose claims have been duly allowed, by the bankruptcy court, amounting in all to $60,000, are, under the theory of appellee, to be deprived of their right to have their debts paid out of these assets; and these creditors are not a party to this suit.

The question in this case is whether or not, under all the facts, the Copper Company was such an owner of the assets of the Smelting Company, that those as-

sets passed to its trustee in bankruptcy to be applied to the payment of its debts. We have shown that one of the most important elements to constitute one company a subsidiary of another, namely, the ownership of the stock of such subsidiary company, is entirely lacking in the present case. The ownership of that stock was not in the Copper Company any time after it was pledged to the Bankers Trust Company. And as the Copper Company did not own the stock after it was so pledged, it cannot be held to own the assets of the Smelting Company, which those shares represent.

The Copper Company did not receive all the profits of the Smelting Company.

Counsel for appellee assert in their brief that the Copper Company received all the profits of the Smelting Company. The lower court made no such finding. The only finding it did make on that point was that one dividend was declared by the Smelting Company on October 31, 1909, and that this dividend was paid to the Imperial Copper Company, as it appeared as the registered owner of all the stock of the Smelting Company. We have supra quoted the words of the finding.

A company might make profits which are not declared as dividends. The statement of counsel for appellee would imply that those profits although not declared as dividends went directly to the Copper Company. But the court made no such finding. What it did find we will now summarize:

The court found, as a fact that all "the bullion pro-

duced by the Smelting Company was **by it** sold to the American Metals Company." (Finding 10, Trans. p. 66).

The American Metals Company rendered to the Smelting Company an account of sale for each lot of bullion it so purchased from the Smelting Company. Finding 11, Trans. p. 69-70).

The Smelting Company endoresed and delivered to the Copper Company the bill of lading for each shipment of bullion; the Copper Company, by drawing drafts on the Development of America in New York, collected and received the purchase price of the bullion so shipped. (Finding 12, Trans. p. 71).

But, we quote from the findings:

> "The amount of the draft, covering the transaction was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amounts of such drafts as a charge againt the Imperial Copper Company."
>
> Finding 12, Trans. p. 71.

The transaction was purely a banking transaction. The American Metals Company owed the Smelting Company for the bullion so shipped; and the Smelting Company caused the Copper Company to collect this debt by delivering to it the bill of lading and having it draw a draft for the amount.

But when the Copper Company did so collect this debt or draft, it did not keep the money as its own. On the

contrary, it credited the account of the Smelting Company with the amount.

That is exactly what a bank would do. It would credit the account of its depositors with the amount collected on the draft.

"The Smelting Company did not keep any bank account with any bank." Finding 13, Trans. p. 72.

The Copper Company was its banker. It deposited with the Copper Company all of its moneys. But the Copper Company did not claim that the moneys so deposited or collected by it belonged to it. On the contrary, it credited the Smelting Company with the moneys so collected and received.

The learned counsel for appellee in their brief say: "The Copper Company received all the profits of the Smelting Company."

They might as well say that a bank with which a merchant deposits all his moneys, and collects all moneys due such merchant, and credits the same to his account, receives all the profits of such merchant; because part of the moneys so deposited and collected are a part of the profits the merchant makes in his business.

Of coruse, in a certain sense, the bank receives those profits. But **when it credits the same** and the other moneys, to the account of the merchant, it receives the same, not for its own use and benefit, but for the use and benefit of the merchant.

And so in the present case. The Copper Company did receive all moneys due the Smelting Company; but as it credited all those moneys to the credit of the Smelting Company, it did not receive those moneys as moneys belonging to it; but as moneys belonging to the Smelting Company. It considered the money as moneys of the Smelting Company, as any bank would do; and it paid that money out upon the written order or request of the Smelting Company, as any bank would do. The Copper Company acted simply as a banker for the Smelting Company.

The Copper Company having credited the account of the Smelting Company with the moneys so received, the question arises what did the Copper Company do with the money. The answer is to be found in the Findings of Fact. We will quote therefrom:

> "The Smelting Company did not keep any bank account with any bank. The method by which it paid its bills, including labor, materials, coke, fuel and all other charges which it had to pay in the conduct of its business was as follows: It made out vouchers which were O.K.'d by its superintendent, and he sent them to the Imperial Copper Company with a request to pay them and charge the same to account of the Southern Arizona Smelting Company. The Imperial Copper Company paid the vouchers, and charged the amount against the Smelting Company, and entries thereof were made on the books of the Imperial Copper Company, showing the transaction; and like entries were made on the books of the Smelting Company.

The Imperial Copper Company did not pay any amounts for the Smelting Company which it did not charge against the Smelting Company.

The accounts between the two companies were balanced monthly.

The Smelting Company kept its own separate books of account and a set of operating books; and entered all items therein, including all items paid for it by the Imperial Copper Company."

Finding 13, Trans. p. 72.

There was no mingling of funds. There was no merger of identity of the corporate existence of each corporation. Each company kept its own books of account; and transacted its own business as a separate and distinct concern.

The court further finds that on July , 1911, when the petition in bankruptcy was filed against the Copper Company, the books of both the companies show that the Copper Company had paid out for the Smelting Company "a total of $26,887.71 in excess of all amounts of money which it had credited to the account of the Smelting Company, so that on said date there remained, according to said books, a balance due from the Smelting Company to the Imperial Copper Company of the sum of $26,887.71." (Finding 16, Trans. p. 74).

And the corut further finds that on January 23, 1912, the then trustee in bankruptcy of the Copper Company brought suit against the Smelting Company to recover this balance claimed to be due. (Finding 17, Trans. p. 74-75).

We submit that these facts so found, conclusively show that the statement made by counsel for appellee on page 19 of their brief, to-wit, "that the Copper Company received all the profits of the Smelting Company," is not warranted or supported by the Findings of Fact in the record in this case.

The business of the Smelting Company was not conducted in the name of the Copper Company; nor were the goods and supplies for the Smelting Company purchased by the Copper Company. The Smelting Company transacted its business and bought its goods and supplies in its own name.

Counsel for appellee on page 22 of their brief make another important statement that is absolutely contrary to the facts found by the lower court, and of record in this case. They say, we quote from their brief, p. 22:

> "The business was all transacted in the name of the Copper Company. All goods and supplies for the mine and smelter were purchased by the Copper Company."

That the Copper Company conducted its own business of mining and bought all goods and supplies for its mines in its own name, we admit. The Copper Company was engaged in mining ores; that was its business. It owned vast mining properties and it was in the business of mining. We not only admit, but we assert, that the Copper Company did carry on all of its mining business, in its own name, and the Smelting Company had nothing whatsoever to do with it.

But when it comes to the business of buying and smelting ores, which was the business of the Smelting Company, we assert that that business was carried on by the Smelting Company in its own name; that it purchased all its supplies in its own name; and that that business was not carried on by the Copper Company in its own name or otherwise. And we further assert that the foregoing statement of counsel for appellee is contrary to the findings of fact in this case.

As the Findings of Fact speak for themselves, we will refer thereto, to show that therein it is specifically found that the Smelting Company transacted all its business, and bought all its supplies in its own name.

1. The contract wherein the Smelting Company agrees to sell to the American Metals Company all bullion it produced was executed by the Smelting Company in its own name. (Finding 7, Trans. pp. 51-63).

2. The Account Sales of all bullion so sold to American Metals Company was made directly to the Smelting Company in its own name. (Trans. p. 69) And form of "Account Sale" Trans. p. 70.

3. Upon shipping each carload of bullion the Smelting Company obtained a bill of lading from the Railroad Company in its own name, which bill of lading it endorsed and delivered to the Copper Company. (Finding 12, p. 71).

4. The Smelting Company smelted for other persons and corporations, ores shipped to it. For each

shipment it made a smelter return in a form similar to the smelter return set forth on page 68 of the record. (Finding 14, Trans. p. 73).

The smelter return referred to shows on its face: "Southern Arizona Smelting Company. Bought of.. * * * (the name of purchaser being inserted).

5. For each shipment of ore made by the Copper Company to the Smelting Company the Smelting Company issued a smelter return, as per form on page 68 of the record, which says: "Southern Arizona Smelting Company. Bought of Imperial Copper Company."

6. Payment for ore so smelted and purchased from other persons by the Smelting Company was made by an order drawn by it upon the Imperial Copper Company, and this order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company." (Finding 14, Trans. p. 73).

7. "In conducting its smelting operations the Smelting Company purchased flux, that is, iron, lime and sulphur, and this expense for flux was a part of the expense of the smelter operations, the same as labor. Coke was also purchased **by the Smelting Company,** and from January, 1908 to September 30, 1910, coke of the value of over $500,000" (Finding 15, Trans. p. 73) was so purchased.

8. This coke and flux was also paid for by vouchers drawn by the Smelting Company from time to time, on the Imperial Copper Company, and the Imperial Copper Company paid the same and charged the same

upon its books against the Smelting Company, in its account against it; the Smelting Company also kept an account thereof on its books.

Without citing or quoting further from the Findings of Fact, we submit that the record shows that the Smelting Company carried on its business in its own name, and itself sold its bullion in its own name, and itself purchased all ores and supplies and coke in its own name. And we further sumbit that there is no finding whatsoever to the effect that the Copper Company in its own name, or even in the name of the Smelting Company, carried on the business of the Smelting Company or bought anything whatsoever for it.

Counsel further assert that all wages of the employees of the smelter were paid by the Copper Company. But they fail to state that the Copper Company only paid those laborers upon an order drawn by the Smelting Company requesting it so to do. And they further fail to state that each order and item so paid by the Copper Company was charged by the Copper Company against the account of the Smelting Company. They hight as well say that a bank paid all of the wages of the employees of the Smelting Company because the Smelting Company drew checks upon the bank requesting it to pay the respective amounts and charge the same to its account.

The mere fact that either the Copper Company, or a bank, paid the wages of laborers, when requested to do by written order of the Smelting Company, and

charged such payments to the account of the Smelting Company, does not justify the statement that either the bank, or the Copper Company, paid such wages; for such payments were made by the bank, or the Copper Company, as the case might be, as agent, and out of the funds of the principal, the Smelting Company.

The Findings of Fact in regard to this payment of wages are as follows:

> "It (the Smelting Company) made out vouchers which were O.K.'d by its superintendent, and he sent them to the Imperial Copper Company **with a request to pay them and charge the same to the account of the Southern Arizona Smelting Company.** The Imperial Copper Company paid the vouchers and charged the amount against the Smelting Company, and entries thereof were made on the books of the Imperial Copper Company showing the transaction; and like entries were made on the books of the Smelting Company.
>
> The Imperial Copper Company did not pay any amounts for the Smelting Company which it did not charge against the Smelting Company."
>
> Finding 13, Trans. p. 72.

We therefore submit that the statement of counsel, to the effect that all the business of the Smelting Company was transacted in the name of the Copper Company; that all goods and supplies for the Smelting Company were purchased by the Copper Company; and that all the wages of the employees of the Smelting Company were paid by the Copper Company; are not supported by the Findings of Fact in the record in this case.

On the contrary, we submit, that the Findings in the record show that the Smelting Company **did** conduct all of its business in its own name; that it purchased all its own supplies in its own name, and itself paid all its own accounts for material and labor.

For the reasons stated on pages 50-51 of our main brief, we do not think the question as to whether the Smelting Company was or was not a subsidiary corporation of the Copper Company is a material question in the present case. But if it is material, then we submit that under the facts as found by the lower corut, the Smelting Company was not a subsidiary of the Copper Company, and that the assets and property of the Smelting Company should be administered upon by its trustee in bankruptcy for the benefit of its creditors, and should not be turned over to Martin, as Trustee in Bankruptcy of the Copper Company, to be applied to the payment of the creditors of that company.

The contract under which the Smelting Company reduced and smelted the ores of Copper Company constituted a sale and not a bailment.

Counsel for appellee in their brief discuss the contract between the Smelting Company and the Copper Company in regard to the smelting ores as though this contract were executory. They utterly ignore what was actually done under the contract. They ignore the interpretation placed upon the contract by the parties. They ignore the fact that the contract has been fully executed.

The question as to the rights of parties under an executory contract is one thing. The rights of the parties after the contract has been executed is another thing.

In an executory written contract, where there is no ambiguity, the court will construe the contract according to the language therein set forth.

But where the contract has been executed; and where, as in this case, new and additional contracts have been made between the parties in pursuance of the executory contract, then the corut will consider what was done. This distinction is clear when the case of Patrick vs. Colo. Smelter, (Colo.) 38 Pac. 236, cited by counsel, is read by the corut.

In that case there was a written contract wherein the defendant agreed to deliver a certain quantity of ore to the plaintiff to be smelted. Defendant refused to deliver the ores and the plaintiff sued for damages for breach of contract. The question in the case was the measure of damages for the breach of an executory contract. The court said, we quote from the decision:

> "The contract was for the treatment of a certain quantity of ore, to be delivered by defendants. The contract was purely executory * * * The question for consideration then, is: In a contract of this kind, what is the proper measure of the plaintiff's damages for the failure of defendants to furnish the ores for treatment? The contract being executory and the ores to be furnisehd not being of any specific grade, quality or value, the damages for non-delivery can have no relation to the quality or value of the undelivered ores, because such

quantity or value could not, without delivery, be determined."

Above quotation is from p. 239, 38 Pac.

Therefrom it will be seen that the foregoing case is not in point.

The case of Chisholm vs. Eagle Ore Sampling Co., 75 C. C. A., 472 Fed. 670-673, cited in our opening brief, was a case requiring the construction of an ambiguous written contract, in regard to the smelting of ores, which had been fully executed by the parties. In that case the court said, in speaking of the written contract:

> "While the words usually employed to indicate an intention to transfer title such as "sell," "purchase," etc., do not appear in the contract under consideration, there is, on the other hand, nothing definitely showing that the claimant intended to retain dominion or control over the delivery to the bankrupt * * * .
>
> But whatever doubts arise from the face of the contract are dispelled by the conduct of the parties under it. It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course of practice, when no controversy existed, is always to be given very great, if not controlling, effect."
>
> Chisholm vs. Eagle Ore Sampling Co., 144 Fed. 672.

The court then considers the acts of the parties in carrying out the contract and holds that the entire trans-

action constituted a sale of the ores to the smeler company, and not a bailment.

Counsel for appellee endeavored in their brief to show that the controlling facts in that case are different from the case at bar. And in so doing they make statements of fact which are not supported by the findings in this case.

Counsel say: "In the present case the property was delivered to the Smelting Company to sell for the benefit of the Copper Company." This statement is not supported by the Findings of Fact in the present case.

In the first agreement between the Smelting Company and the Copper Company, of date August 14, 1906, set forth in full Transcript, pages 47-51, the only provision in regard to the delivery and smelting of ores is as follows:

> "and (Copper Company) agrees to furnish the "Smelting Company" with all ores of every kind produced from the mines of the "Copper Company" (whether such mines are now owned or hereafter acquired by the "Copper Company)" that may be desired by the "Smelting Company" to be smelted and reduced by the "Smelting Company." The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter.
>
> The smelting, reduction and marketing of such ores so delivered by the "Copper Company" to be done by the "Smelting Company" at the actual cost thereof, plus five per cent interest on the cost of the property and plant to the "Smelting Company"
> * * *

> And the "Smelting Company" further agrees to take and reduce the ores so to be furnished by the "Copper Company" upon the terms and at the prices for smelting hereinbefore set forth."

Transcript, p. 49.

After this agreement had been made, and before the Smelting Company commenced operations, another contract was entered into between the Smelting Company, as the first party, the American Metals Company, Ltd., as the second party, and the Copper Company, as the third party. The date of the agreement is December 16, 1907. This agreement is set forth in full in the transcript, pages 52-64.

In this agreement the Smelting Company agrees to sell its entire output of copper ore to the American Metals Company. We will quote from the agreement:

> "The party of the first part agrees to sell and hereby does sell at the price and upon the terms hereinafter set forth to the party of the second part, the entire output of copper now or at any time during the existence of this agreement smelted, owned or controlled by it, which it guarantees shall not be less than one million two hundred and fifty (1,250,000) thousand pounds to one million five hundred thousand (1,500,000) pounds monthly, subject to conditions hereinafter set forth, for a period of three (3) years beginning with the first shipment expected to be made in January, 1908, and terminating three (3) years thereafter."

Transcript, pp. 52-53.

In said agreement the Metals Company agrees to purchase the copper or bullion so to be shipped to it by

the Smelting Company and to pay therefor in the manner in said agreement set forth, such payments to be made to the Smelting Company. We will again quote from the record:

> "The party of the second part agrees to purchase and hereby does purchase the said material from the party of the first part upon the terms herein set forth, and agrees to pay to the party of the first part for the same in the manner following:"

The method of payment is provided for in the agreement. Again we quote from the record:

> "The party of the first part shall have the privilege of drawing at sight upon the party of the second part for ninety (90) per cent of the approximate value of such blister copper, less freight and interest and refining charges as above set forth, as shown by bill of lading, satisfactory assay certificates (the assay certificates will be satisfactory if approved by the General Manager or Local Superintendent of the party of the first part), smelter and railroad scale weights attached to the draft, in which event the party of the first part shall allow the party of the second part interest at the rate of six (6) per cen per annum on such advances from the day the drafts are paid until dates when payments would otherwise be due."

Transcript, pp. 54-55.

> "The due dates upon which the party of the second part agrees to account and pay for the material to be as follows:
>
> a. For the gold and silver ninety (90) days from date of arrival of the consignment at Nichols Dock or Siding or lighterage free New York.

b. For the Copper sixty (60) days from date of arrival of the consignment at Nichols Dock or Siding, or lighterage free New York."

Transcript, p. 58.

After each carload of copper bullion was shipped by Smelting Company to the American Metals Company another written instrument was executed by the Ameri can Metals Company which showed upon its face that the Metal Company bought this bullion from the Smelting Company. This paper is called an "Account Sale." A form thereof is set forth on page 70 of the transcript. The heading on this written instrument is as follows:

ACCOUNT SALE June , 1910.
FOR THE SOUTHERN ARIZONA SMELTING CO.
TOMBSTONE, ARIZONA

BY THE AMERICAN METAL COMPANY, NEW YORK, N. Y.

Again, the court found as a fact:

"The bullion which resulted from the smelting of these ores, and all other ores smelted by the Smelting Company, was by the Smelting Company shipped and sold to the American Metals Company."

Transcript, p. 69.

The foregoing agreements and documents and findings show that the Copper Company did not deliver its ore to the Smelting Company for the purpose of the Smelting Company selling it for the benefit of the Copper Company, as asserted by counsel. They show that

the ores were delivered to the Copper Company for the purpose of converting the same into copper bullion, and that it was agreed that the Smelting Company should sell this bullion to the American Metals Company and the American Metals Company should pay the Smelting Company therefor.

Again counsel assert in their brief, (p. 32-33): "No price was agreed which the Smelting Company should pay to the Copper Company for the ore."

This statement is contrary to the facts as found by the lower court. The facts as found on this point are as follows, again we quote from the record:

> "The Imperial Copper Company shipped its ore to the Smelting Company in carload lots. Both companies made assay of the ore so shipped. The assay of the Smelting Company controlled unless there was a great variation, when the sample of each company was given to an umpire who assayed the same, and the assay of the umpire was taken as final.
>
> Shipments of ore were made every day by the Copper Company to the Smelting Company, and an assay was made of every lot; a lot comprised one or more cars of ore. Smelter returns upon each lot of ore so sampled and assayed by the Smelting Company were made by it; duly signed, checked by its clerks and given to the Imperial Copper Company. Each of said smelter returns was in the following form, as shown by the smelter return of September 10, as follows, to-wit."
>
> Transcript, p. 67.

Then follows the form of smelter returns which the

Smelting Company executed for each lot of ore it so received. We call particular attention to this form of smelter return, (Trans. p. 68) it being too elaborate to copy into this brief. This smelter return is headed as follows:

SOUTHERN ARIZONA SMELTING COMPANY

Sasco, Arizona, September 8th, 1910.

Bought of IMPERIAL COPPER CO.,

Address Silverbell, Arizona.

Then follows the number of pounds of ore; then follows the assay value of the copper therein. The form of assay return as to this is as follows:

Copper 2.32% 46.4 lbs.@9.917 cts. $4.60

From this is deducted the treatment charge, leaving a net price per ton for this particular lot of ore of $2.40.

Then follows the following:

Gross Proceeds, 1,468,464 tons@$2.40..$3524.31

Then follows:

"Balance Due.....$3524.31

(Trans. p. 69).

This smelter return shows upon its face that the price paid for the copper contained in the ore shipped and accounted for in this assay return was at the rate of 9.917 cts. per pound, and there being 46.4 pounds of copper in each ton, the price paid for each ton was $4.60, less treatment charge, leaving a net price per ton

of $2.40. And then upon the total amount of tons so shipped the total price due from the Smelting Company to the Copper Company is set forth at $3,524.31.

The court further finds as a fact, that this net value of each ore shipment was credited to the account of the Imperial Copper Company. Again we will quote the finding:

> "The net value of each ore shipment, so ascertained and shown on each smelter return, was credited to the account of the Imperial Copper Company on the books of the Smelting Company; and the amount was also entered on the books of the Imperial Copper Company as representing the value of the ore so shipped by the Copper Company to the Smelting Company."
>
> Transcript, p. 69.

The foregoing findings contained in the record, therefore conclusively show that there **was** an agreed price which the Smelting Company should pay to the Copper Company for each particular lot of ore delivered. They show that not only was this price agreed upon, but a balance was struck and entered upon the books of both of the companies as the price and value for the specific lot of ore so shipped by the Copper Company to the Smelting Company.

We therefore say that the statement of counsel in their brief that "no price was agreed which the Smelting Company should pay to the Copper Company for the ore," is contrary to the actual facts as found by the court, and we further say that a price was agreed upon by both the companies for each lot of ore so shipped.

The Copper Company charged the Smelting Company on its books with the net value of each ore shipment; it charged the Smelting Company on its books with every dollar that it paid out for the Smelting Company, at its request. On the other hand, the Copper Company credited the Smelting Company with all the money which the American Metals Company paid upon the purchase of the bullion resulting from the smelting of the ores. We have also shown that the Smelting Company kept the same account in its books; and we have further shown that after the many years of dealings between the two companies, and after all of the moneys due from the Smelting Company to the Copper Company for ores and moneys paid out by it had been so charged, there remained a balance of some twenty-six thousand dollars due from the Smelting Company to the Copper Company, this being the balance as shown by the books of both the companies on July 5, 1911, when the Copper Company was thrown into bankruptcy. (Finding 16, Trans. p. 73-74).

And we submit that the case of Chisholm vs. Eagle Ore Sampling Company, supra, is directly in point and is conclusive that the transactions between the Copper Company and the Smelting Company constituted a sale and not a bailment.

The mortgage or deed of trust executed by the Copper Company to the Bankers Trust Company, to secure the $2,000,000 of bonds was duly recorded June 24, 1904.

Counsel for appellee further say in their brief, (p. 22) that "The manner in which the Copper Company transacted its business shows conclusively that it held out to the world that it owned all these properties, both mines and smelter."

That the Copper Company did own all the mines is conceded in this case. That it owned the shares of stock of the Smelting Company, at one time, is conceded.

But when it executed a mortgage on these mines, and pledged all these shares of stock to secure its issue of $2,000,000 of bonds, its ownership was subject to the lien of that mortgage.

All parties who dealt with the Copper Company, all creditors who lent it credit, had notice of this mortgage lien, for the mortgage was recorded in the office of the County Recorder.

This mortgage covered all the property which the Copper Company had, **or might thereafter acquire.** We will quote the finding of fact on this point:

> "That on or about the 11th day of May, 1904, the Imperial Copper Company duly authorized the issuance and sale of $2,000,000 of first mortgage bonds, and on said day, under proper corporate authority it did execute to the Bankers Trust Company, a corporation, doing business in the State of New York, a deed of trust conveying to it all of the real and personal property which it then owned, or might thereafter acquire, as security for the said bonds, so authorized to be issued, which deed of trust was duly executed and recorded on

June 24, 1904, in the office of the County Recorder, of Pima County."

Finding 2, Trans. p. 44.

What the Copper Company did was to hold itself out ot the world as owning mines, shares of stock and other property, all of which, as well as all property it might thereafter acquire, was subject to the mortgage duly recorded. We have shown that this mortgage has been foreclosed, and that all the property covered thereby, including the shares of stcok of the Smelting Company, was sold.

Men lend credit to raildoad corporations, all of whose property is mortgaged to secure bonds. But this does not give the creditor a right to the mortgaged property, superior to the holders of the mortgage lien.

There is no question of fraud in the present case. There is no finding of fraud.

The question, so far as the Copper Company owning the assets of the Smelting Company is concerned, is simply this: When one corporation owns all the stock of another corporation, and pledges that stock to secure its own debts, are the rights of its general creditors superior to the rights of the pledgee of that stock. Can these general creditors ignore the fact of the pledge; ignore the fact that the pledge has been foreclosd and that a third person has for value purchased the same at forecloseure sale, and recover the assets and property which those shares of stock represent.

OTHER POINTS RAISED BY COUNSEL FOR APPELLEE.

Counsel complain that we did not assign as error the conclusion of law of the lower court to the effect that the Smelting Company was a subsidiary of the Copper Company.

We did assign as error that all the conclusion of law of the lower court were erroneous, and that there should be no doubt as to what conclusion of law we referred to we quoted them in full in the assignment. Tr. p. 98. We think this sufficient.

The lower court in its decree simply decreed that Martin, Trustee, was the owner of the flue dust and slag dump, and that Freeman, Trustee, was not the owner thereof. The court did not ajudge or decree that the Smelting Company was a subsidiary of the Copper Company. See Transcript, pp. 93-95. We have duly assigned that this decree is erroneous and we refer to our assignments of error in the transcript, pages 98-101, as being amply sufficient to raise all the questions in this case.

Again counsel complain that we did not specify as a point of law to be discussed the question of whether or not the Smelting Company was a subsidiary of the Copper Company. We take issue with the gentlemen as to this. We did not use the word "subsidiary"

corporation, but we did say that the point of law to be discussed was this, to-wit, we will quote:

> "As the Copper Company had pledged as security for its bonded indebtedness, all of the shares of the capital stock of the Smelting Company owned by it, and as that pledge has been foreclosed and the shares under such foreclosure had been sold to a third person, to-wit, Leo Goldschmidt, who is now the owner thereof; neither the Copper Company, nor its Trustee in Bankruptcy, is the owner of those shares of stock, nor of the assets of said Smelting Company which these shares represent; but said assets belong to the stockholders of said Smelting Company, to-wit, Leo Goldschmidt, and his assigns, subject to the payment of the debts due by the Smelting Company."
>
> Transcript, p. 28, 29.

Again, in our specification of errors relied on, page 27, of our brief, we specify in paragraph 1 the specific error which appears in the decree in this case, namely:

> "The decree of the court is erroneous in this:
>
> That therein John H. Martin as Trustee in Bankruptcy of the Imperial Copper Company, is adjudged to be the owner and entitled to possession of the flue dust and slag dump in controversy in this action, whereas, the court should have adjudged and decreed that M. P. Freeman, as Trustee in Bankruptcy of the Southern Arizona Smelting Company, was the owner and entitled to the possession thereof."

We also refer to our other specifications of error.

This is a suit in equity. The facts in the case are agreed to by the parties as found by the corut. Under

those facts the court decreed that Martin, Trustee, was the owner of the property in dispute and that Freeman, Trustee, was not entitled thereto. We have assigned and specified and pointed out that this decree is erroneous in that under the facts the court sohuld have decreed that Freeman, Trustee, was the owner and entitled to the property in dispute.

We submit that this decree of the lower court is wrong and should be reversed, and the case should be remanded to the lower court, with directions to enter judgment in favor of M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, and as set forth in our main brief herein.

Respectfully submitted,

SELIM M. FRANKLIN,

Solicitor for M. P. Freeman,

Trustee, etc., Appellant.